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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF PETITIONER

PETER C. ANDRESEN
Petitioner
3514 Plyers Mill Road
Kensington, Maryland 20795

ABB DUPLICATORS, INC.—1722 Eye Street, N.W.—Washington, D.C.—298-6837

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 24 Md. App. 128, 331 A.2d 78 (1975), and is printed in the Appendix, *infra,* page A-1.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, which is to be reviewed, was dated January 10, 1975.

(A-1) A timely Motion for Reargument and Modification of Opinion was denied and that Court's Mandate was issued on February 11, 1975. (A. 89, 90)

A timely Petition for Writ of Certiorari to the Court of Special Appeals of Maryland was filed in the Court of Appeals of Maryland, the highest Court of the State, and was denied on March 31, 1975. (A. 92) The time within which to petition for certiorari to this Honorable Court therefore ran from that date.

The Petition for Writ of Certiorari was filed in this Honorable Court on June 28, 1975 and was granted on October 6, 1975.

The jurisdiction of this Court is invoked under *28 U.S.C., Sec. 1257(3).*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States: Amendment IV —
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V —
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV —

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland:

Article 35, Sec. 5(a) General rule —
No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Article 27, Sec. 551 —
Whenever it be made to appear to any judge . . . by a written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants,

that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by an individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge . . . or that any property subject to the seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such judge . . . may forthwith issue a search warrant directed to any duly constituted policeman . . . authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued.

Declaration of Rights to the Constitution of Maryland:

Article 26 —

* * * and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

QUESTIONS PRESENTED FOR REVIEW

I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes and memoranda, books, and records, which were seized

from his desk and files in his personal office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?

STATEMENT OF THE CASE

The "inner sanctum" of Petitioner's law offices and files was invaded in October, 1972, by police officers and members of the State's Attorney's staff armed with an alleged warrant to search the premises. The searchers, approximately eight in number, spent the greater part of six hours rummaging through Petitioner's desk and private files. All of the private papers, documents and handwritten notes present and belonging to the Petitioner were scanned, many were examined with detail. Upon completion of the search, the officers carried literally thousands of such testimonial and communicative papers away with them.

On the next day Petitioner was charged by a Bill of Information with four counts of false pretenses, containing virtually the same substance as contained in the application for the search warrant. About two weeks later, after thorough examination of the seized papers by the searchers, Petitioner was indicted on approximately fifty (50) additional counts. The subject matter of all of the estimated fifty-four (54) counts was significantly disclosed by the private papers taken.

The State elected to try Petitioner on the original four counts consolidated with seventeen other counts, forming one of the indictments, for a total of twenty-one (21)

counts. (A. iii) Petitioner filed a motion to suppress the papers seized, (A.129) among others. At the pre-trial hearing thereon, the State elected to present only a small fraction of the papers seized as pertaining to the charges upon which Petitioner was to be tried. These papers still numbered in the hundreds. A great portion of the papers presented at the hearing was suppressed by the trial judge; but a significantly large number were not. This conclusion was reached by the trial court by its application of *Warden v. Hayden*, 387 U.S. 294 (1967) to petitioner's case by stating in its Memorandum Opinion and Order (A.136) that:

> "The Hayden case, however, overruled this distinction and held that the Fourth Amendment of the United States Constitution was not violated by the seizure of 'mere evidence' if there was proven to be a nexus between the items seized and the criminal behavior. This case held that 'mere evidence' may be seized if probable cause can be established that the evidence will aid in the particular apprehension or conviction . . . As to the excepted items, it appears to the Court that the State has conclusively shown a nexus between them and the alleged criminal behavior."

The trial court also rejected all of petitioner's attacks upon the warrant, its reasonableness and the extent of the search, whether authorized by the warrant or not. (A.136) In specifically rejecting petitioner's Fifth Amendment claim that the private papers seized could not be used against him, since they were privileged, the trial court held:

> "The thrust of defendant's argument here is that he has the right of privacy in and over his person, house, papers and effects, on the ground that to permit these items to be introduced into evidence would be prohibition against compulsory self-incrimination.
>
> "On this point there seems to be no Maryland law, and in two cases before the Federal system, the Courts took opposite views and in both cases certiorari was denied by the United States Supreme Court.
>
> "In *United States v. Blank*, 495 Fed.2d 383 [Sixth Circuit, 1972], the United States Court made a distinction between those records sought by subpoena and records sought by search warrant. They held that there was a valid and important distinction. The subpoena compels the person receiving it by his own response to identify the document and deliver as the one described in the subpoena; the search warrant involves no such element of compulsion upon an actual or potential defendant. In the *Hill v. Philpott* case, 445 Fed. 2d 145, Second Circuit (sic), the Court held that the subpoena-search warrant distinction was 'more shadow than substance,' and held that the seizure of personal papers of the defendant was in violation of the Fifth Amendment. The Blank case in effect rejected the holdings in the Philpott case, and seems to this Court to be the better law. 8J, Wigmore, *Evidence*, Sec. 2264 [McNaughton, Rev., 1961]. It is conceded in this case that

> evidence produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing. Relying on the Blank case and Wigmore on *Evidence*, this Court holds that the seizure of the excepted items by search warrant does not violate the Fifth Amendment to the United States Constitution."

Those papers remaining unsuppressed were introduced into evidence, over objection, at Petitioner's trial (Ex. A. 173-177) and were significantly important in leading to his conviction, as is evidenced by the Opinion of the Court of Special Appeals of Maryland. (A. 19, 24, 25)

The Court of Special Appeals, in upholding the decisions of the trial judge as to petitioner's Fourth and Fifth Amendment challenges, also identically rejected the holding of *Hill v. Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), and adopted the holding of *Blank v. United States*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, just as the trial judge had done. (A. 28-54)

Following the trial, during which the tainted seized evidence was used against him, Petitioner was convicted by the jury of all of the eight counts not abandoned by the prosecution. The Court of Special Appeals then reversed four of the counts. This leaves the Petitioner presently convicted of the four counts which are to be reviewed by this Honorable Court.

SUMMARY OF ARGUMENT

I

Petitioner argues as to Question I that the Fifth Amendment prohibition against compulsory self-incrimination applies as well to personal business papers seized from his offices as it does to the same papers being required to be produced under a subpoena. In this case, Respondent, and the lower courts, concede that the Fifth Amendment would have applied to the papers in question had they been sought by subpoena. They, however, conclude that, because the papers were seized under a warrant held to be otherwise reasonable, they are not protected because petitioner "was not compelled to do anything." (A. 51-4)

In essence, the lower courts opted to adopt the reasoning of *United States v. Blank*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, whereas petitioner argues that the better reasoning, as shown by the past decisions of this Court, is that of *Hill v. Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), which holds contra to the *Blank* case.

To underline his contentions, petitioner points to the reasoning of the recent cases of *Vonder Ahe v. Howland*, 508 F.2d 364 (1975), *Bellis v. United States*, 417 U.S. 85 (1974) and *Couch v. United States*, 409 U.S. 322 (1973). He also relies on Art. 35, Sec. 5(a), *Annotated Code of Maryland*.

II

As to Question II, petitioner argues that the search of his offices was violative of the Fourth Amendment for

several reasons, any one of which would require the exclusionary rule to be invoked:

A. The search warrants were never formally introduced into evidence against the petitioner. Petitioner argues that this was a necessary element of proof that could not be dispensed with as was opined by the lower Courts.

B. Because of the descriptive terminology of the things to be seized used in the search warrants (A. 94-118), they became prohibited "general" warrants not "particularly describing the . . . things to be seized". It is argued that already general warrants were made even less particular by the addition, at the end of the descriptive phrase, of the following terminology:

> "together with other fruits, instrumentalities and evidence of crime at this time unknown."

C. Under the circumstances, it was impossible for the judge who issued that warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises to be searched. Not only did the nature of the crime relied on preclude this, but the affidavits in support of the applications recited hearsay facts, the nature of which was abundantly stale, disputed and argumentative.

D. The principals and purposes of *Warden v. Hayden*, 387 U.S. 294 (1967), as to the admission of the seized papers, were violated by the lower Courts. It is petitioner's argument that the cited case, in its own words, requires a "consideration of police purposes". It is contended that an examination of these purposes reveals that the search and seizure was unreasonable.

E. The two-prong test of credibility-reliability and trustworthiness of the non-swearing informants was not satisfied. The test is required by *Aguilar v. Texas*, 378 U.S. 108 (1964). In petitioner's case, the affidavits were based, not on personal observations, but solely on hearsay evidence. As is shown by the content of the affidavits and the testimony of the affiants, not only were there no facts set out to substantiate the credibility of the informants and the reliability of the information, but that the informants were not disinterested and the facts alleged were the subject of a heated civil controversy upon which petitioner ultimately prevailed, of which the affiants had full knowledge and failed to reveal to the issuing judge and they were in fact false.

ARGUMENT

I

AN ATTORNEY AT LAW, WHO IS A SOLE PRACTITIONER, MAY INVOKE HIS PRIVILEGE AGAINST SELF INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES, TO PREVENT THE INTRODUCTION OF HIS PERSONAL HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS, WHICH WERE SEIZED FROM HIS DESK AND FILES IN HIS PERSONAL OFFICE, UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, INTO EVIDENCE AGAINST HIM AT HIS CRIMINAL TRIAL.

As to this premise, review has apparently been granted because:

1. The state court has decided an important federal constitutional question which has not heretofore been determined by this Court; and has decided it in a way probably not in accord with applicable decisions of this Court

on the same subject, but not precisely on the same point; and, in so doing has adopted the holding of a federal court of appeals wherein:

2. A court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has decided an important federal constitutional question which has not been, but should be, settled by this Court; and has decided it in a way in conflict with applicable decisions of this Court on the same subject, but not precisely on the same point.

The above premise is true because the state courts have adopted, as being correct, the reasoning of *United States v. Blank, supra,* as stated in the Statement of the Case herein, in holding that the Fifth Amendment privilege does not attach to personal records simply because they were seized under a valid search warrant, because:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant."

In so doing, the state courts have openly and directly rejected the holding of *Hill v. Philpott, supra,* (another United States Court of Appeals case recently cited with unanimous approval of this Court in *Bellis v. United States,* 417 U.S. 85, 87-8 (1974)). *United States v. Blank* and *Hill v. Philpott* are in direct conflict as to the reasoning used in the premise decided in petitioner's cause.

Hill v. Philpott held that personal business records seized by an Internal Revenue agent could not be used without violation of the defendant's Fifth Amendment rights.

It is important to note that the State of Maryland does not contend, nor did the state courts take issue with the fact that the papers seized and admitted into evidence over objection in petitioner's case were personal papers of the type which would ordinarily be privileged and could not be used against him. Both the respondent and the state courts readily admit that, if the subject documents had been sought by subpoena, rather than seized, they would have been privileged. (A. 51, 142). They, however, each conclude that, because the search and seizure of the papers was held to be reasonable, the Fifth Amendment protections therefore do not apply because petitioner "was not compelled to do anything". (A. 51-4)

However, in its Brief in Opposition to the Petition for Writ of Certiorari, Respondent belatedly sought to argue the characterization of the papers. This argument should fail for three reasons:

1. It should be underscored that this argument comes too late. Respondent conceded the nature of the papers below when it admitted that they would have been protected had they been sought by subpoena rather than search warrant. Evidence of this concession at both the trial level and appellate level appears in the appendix as follows:

a. At the trial level, quoting from the Trial Judge's opinion on the seized evidence in this case, the Court said (at A. 142):

> "It is conceded in this case that evidence produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing."

b. At the appellate level, quoting from the Opinion of the Court of Special Appeals, the Court said (at A. 51):

> "The State's position, on the other hand, is that is proceeded exclusively on a Fourth Amendment basis, whereunder probable cause will justify a court's warrant to search for and to seize incriminating evidence, and not upon a Fifth Amendment basis, whereunder a suspect is required by subpoena to present for examination his records which *may* be incriminating."

2. Respondent somehow reasons that if the subject papers reflect business thoughts that they are no longer personal thoughts. The Constitution does not differentiate between business and family thoughts. The important things are:

a. The subject papers were clearly in the possession, not to mention the ownership, of the petitioner at the time of their seizure and "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment". *Couch v. United States,* 409 U.S. 322, 327 (1973).

b. The numerous seized notes, memorandums, estimates, abstracts, letters of correspondence and other papers

in question, many of the most incriminating of which were shown to be in the handwriting of the petitioner, are the kind of "communicative act or writing" that would reflect the author's personal thoughts, opinions and conclusions. *Schmerber v. California,* 384 U.S. 757 (1965). See also, *Gilbert v. California,* 388 U.S. 266-67 (1967) which held that the taking of handwriting exemplars is a form of compulsion within the meaning of the Fifth Amendment, but that, "A mere handwriting exemplar, *in contrast to the content of what is written,* like the voice or body itself, is an identifying physical characteristic outside of its protection" because it is not the kind of "communication" covered by the privilege. (Emphasis added.)

3. Many, if not most, of the seized papers introduced, over objection, at petitioner's trial were shown to be in the personal handwriting of the petitioner. All of them were owned and maintained by him in his office desk and files. These papers were significantly important in leading to his conviction as is evidenced by the Opinion of the Court of Special Appeals. Among these papers were:

a. "(H)is preparation of settlement sheets in his own handwriting". (A. 19) These were work sheets and estimates prepared by petitioner and changed, amended and scratched out many times prior to the actual typewritten (or final) sheet used at settlement.

b. "A small memorandum — type note — analyzed to be in the handwriting of the appellant — ". (A. 24) This was the original of a memorandum written by petitioner and maintained in his own file.

c. "The contract, in the appellant's handwriting". (A. 25) This was the original copy prepared by petitioner and maintained in his own file.

d. "(A) folder . . . which contained title rundowns, work sheets, deeds of easement, declarations of covenants, abstract reports, deeds of trust and title binders . . . with additional notations . . . a grantor list . . . a handwritten page from a legal pad", etc. (A. 46 - 7) These items were the file copies of various papers in "scratch" and initial form, many handwritten. Some of them were later typed in final form. Some of them had personal notations thereon. All were maintained by petitioner in his own files.

e. See, also excerpts from the transcript of testimony at pages A. 150-151, 159-161, 162, 163, etc.

Petitioner, initially must state that he does not agree with the reasoning of *Blank* that there is no element of compulsion present when a defendant's personal papers are seized. In petitioner's view, as well as the view of this Court he believes, there is a greater degree of compulsion exhibited by a forced taking of one's personal papers during a search and seizure than by directing production of those documents by use of a subpoena.

Such a holding is a complete divorce from the true meaning of compulsion or being compelled. Recently, in his concurring opinion in *Couch v. United States,* 409 U.S. 322 (1973), Mr. Justice Brennan observed:

> If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain

> the documents without requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety depcsit box against the will of the owner of the documents, the owner has been compelled, in my view to incriminate himself within the meaning of the Fifth Amendment.

Furthermore, the reasoning of *Blank,* relied on so strongly by the State courts, was somewhat "watered down" by its additional holdings in that instance that the papers seized "were not communicative in nature", were not "personal and private writings", and were "on their face instrumentalities" of a crime. This is the probable reason why certiorari was denied in that case by this Honorable Court. Such is concededly not true of petitioner's case!

Also, after initially fully adopting the views of *Hill v. Philpott,* the Court of Appeals in *Vonder Ahe v. Howland, supra,* over the strong dissent of Judge Ely, who had written the initial opinion, sidestepped the issue without rejecting either *Hill* or *Blank* when they remanded the issue for determination at the trial level, if and when proceedings were ever brought against the Appellant, by adopting the language from *Blank* that:

> Here, in fact, we have no way of knowing that the instant records are connected with the defendant beyond his counsel's statement in the motion to suppress that they "may be" in his handwriting. This, however, is an important fact upon which the government must at trial bear the burden of proof and upon

> which, for all we know, there may be strong dispute.

Such, importantly is not true of petitioner's case. Not only were many of the records seized in the instant case shown to be in petitioner's handwriting, but it is obvious that the balance of them were prepared by his amanuensis. It is also significant that the issue was again raised by the petitioner at the trial level when the State offered the seized papers into evidence. (Ex. A. 173-177)

Respondent, in its Brief in Opposition to the Petition for Writ of Certiorari, also argued in favor of the *Blank* reasoning. In petitioner's view, Respondent's argument and case citations tend to magnify and more fully illustrate that the reasoning of *Hill v. Philpott, supra,* is the better rule; and is the one which should be adopted by this Honorable Court. See, for instance, page 8 of Respondent's brief, where, quoting from *United States v. Beck,* 511 F. 2d 997 (C.A. 6, 1975), it was said:

> "*United States v. Gargotto,* 510 F.2d 409 (6th Cir. 1974), sustained the reasonableness of a search involving much greater 'rummaging'. Cf. *Philpott, supra* (more than thirty cartons of records seized); *United States v. Zive,* 299 F. Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers.)"
>
> [Footnote 4: Testimony in the instant case revealed a seizure of less than 5% of Petitioner's files.]

Gargotto involved a seizure during a fire emergency without a warrant. No Fifth Amendment contention was raised. It was held that there was no need for a search warrant due to exigent circumstances. In the *Zive* case, The Court described the search of at least seven desk or file drawers as:

> What was done here seems precisely what Judge Learned Hand described as "rummaging about among his effects to secure evidence against him". *United States v. Poller,* 43 F.2d 911, 914 (2nd Cir. 1930).

In petitioner's case, the "5% seized" amounted to literally thousands of papers which later filled several file cabinet drawers in the office of the States Attorney. (See Returns at A. 119, 122, which each folder contained approximately 50 to 100 and sometimes over 200 pages). Every wer drawer in petitioner's desk, and each and every adjoining desk, every file in every bookcase and credenza and each of over twenty file cabinet drawers were searched. Most important was the scope of the search wherein virtually *every one* of the thousands of papers present therein were scanned and most were examined with detail. The searchers, approximately eight in number, spent the better part of six hours conducting the search.

Each of the cases cited by respondent which appear to be favorable to its cause are distinguishable from the instant case (and *Hill v. Philpott*) upon a closer examination of the facts, involved (as was also true of the *Blank* case):

1. *United States v. Beck,* 511 F.2d 997 (6th Cir., 1975) involved a warrantless automobile search under exigent circumstances. The police looked only at the

first page of the seized notebook in the absence of the appellant. The appellant was unaware of the search and offered no resistance, and therefore the Court felt that there was no "compelled cooperation". As to the reasonableness of the search, the Court reasoned that "the vice lies in the unlimited search" and distinguished between the one page of the notebook seized and a greater "rummaging".

2. *United States v. Scharfman*, 448 F.2d 1352 (2nd Cir., 1971), cert. denied 405 U.S. 919 (1972) involved the seizure of a listing of fur shipments incident to a warranted search for stolen furs.

3. *United States v. Murray*, 492 F.2d 178 (9th Cir., 1973) involved a seizure of an address book in addition to 10.8 pounds of heroin and resulted from a search incident to a lawful arrest. *Murray*, as well as *Beck* relied on *United States v. Bennett*, 409 F.2d 888 (2nd Cir., 1969) wherein a letter was seized, not from the appellants, but from the girl friend of one of them during a lawful search of her pocketbook for narcotics.

4. In *Marron v. United States*, 275 U.S. 192 (1927), the Court reasoned that the utility bills were seized incident to a lawful arrest. (There was no arrest of petitioner at the time of the seizure in the instant case.)

Concluding, it must be said that the substantive merit of the approach of the *Blank* case should not be accepted. "One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be borken down, he would be placed under arrest,

and the desired material would be seized. How the imminence of such force can be considered as anything other than compulsion escapes" petitioner. *Vonder Ahe v. Howland, supra.* (Concurring and Dissenting Opinion.)

As it was said in *Hill v. Philpott, supra:*

> "The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice."

See also, *Hale v. Henkel*, 201 U.S. 43, 76 (1906) wherein this Honorable Court said:

> ". . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum* against which the person, . . . is entitled to protection"

Finally, it is submitted that the applicable previous decisions of this Court indicate that the holding of the *Blank* court and the state courts in this cause must be rejected and that of the *Hill v. Philpott* court upheld.

As recently as in *Bellis v. United States, supra*, Mr. Justice Marshall proclaimed for this Court that:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible

and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635; *Wilson v. United States*, 221 U.S. 361, 377 (1911). The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969). As the Court expiained in *United States v. White, supra*, at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio v. United States*, 354 U.S. 118, 125 (1957); *Couch v. United States, supra*, at 330-331 . . . . We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought" — an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication — and "proscribes state intrusion to extract self-condemnation," *Couch v. United States,*

supra, at 327. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The above dissertation reflects the teaching of the great English case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), which were cherished by our statesmen when the Constitution was adopted. These teachings were first enunciated in *Boyd, supra*, then in *Gouled v. United States*, 255 U.S. 298 (1921), and again in *United States v. Lefkowitz*, 285 U.S. 452 (1932) wherein it was said that in *Entik v. Carrington:*

> Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help federal conviction even in cases of most atrocious crime . . .

In *Weeks v. United States*, 232 U.S. 383 (1914), it had been said:

> . . . as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, . . . is entitled to protection."

In *Warden v. Hayden*, 387 U.S. 294 (1967), the landmark case for seizure of "mere evidence" as opposed to fruits of crime, etc., which the state courts in petitioner's case reason as overruling *Gouled* as to the above cited protection as to private papers, dealt with articles of clothing, and in fact expressly eliminated personal papers from its holding, when the Court said at page 302-3:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The principles of *Boyd* were therefore not overruled by *Warden v. Hayden*, but in fact upheld!

Thus, when the *Hill v. Philpott* Court stated:

> The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "instrumentalies, fruits of crime, or contraband." In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion . . .
>
> Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in the case from the books and papers involved in both *Boyd* and *Gouled*.

— they were professing the status of the law of the land in this regard, which remains so.

It is important enough to mention again that the subject records were *clearly in the possession*, not to mention the ownership, of the petitioner at the time of their seizure and "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." *Couch, supra*, at 331. Thus, these records were protected from seizure by the Fifth Amendment. *Vonder Ahe, supra.*

Additionally, Article 35, Section 5(a), *Annotated Code of Maryland*, also precluded the admission of the evidence seized under the search warrant in petitioner's trial for false pretenses, a misdemeanor.

Art. 35, Sec. 5, since repealed, was in full force and effect at the time of the search and seizure and at the time of Petitioner's trial. Subsection (a) thereof provides:

> No evidence in the trial of misdemeanors shall . . . be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Since the effect of the admission of the seized evidence was to compel Petitioner "to give evidence against himself" and since the statute prohibited the admission of same in no uncertain terms, his convictions should have been reversed by the Court of Special Appeals.

This premise was pointed out to the Court in Petitioner's appeal brief, argued before the Court and brought up again on motion for reargument, all to no avail since the

Court of Special Appeals refused comment on it. In ignoring the cited statute the Court of Special Appeals has denied Petitioner his constitutional rights.

II

THE SEARCH OF PETITIONER'S OFFICES WAS VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

A. The search warrants were never formally introduced into evidence.

In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court made the observation that if the State relied upon a search warrant to justify a search, but failed to produce it in evidence, "there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause" (footnote 15 at page 550). In Cornelius, *The Law of Search and Seizure*, 185, "Duty of prosecution to introduce search warrant, in evidence," (1926), it is stated:

> "A conviction cannot be sustained where a search warrant, under which the evidence has been obtained, is not introduced in evidence, where it appears from the evidence that the discovery and seizure * * * was attempted to be justified by the officer's possession of a search warrant the validity of which, though objected to and attacked, was not established by the introduction of the warrant itself, or by proof of its contents."

In its brief in opposition to the petition for certiorari respondent does not take issue with petitioner's authorities.

Since the Opinion of the Court of Special Appeals of Maryland clearly shows that the warrants were never formally introduced into evidence (A. 31), where it said:

> Although the magic words, "we hereby formally introduce the search warrants as exhibits," may not literally have been uttered, . . .,

Respondent's position that they were apparently introduced is refuted.

Admittedly, the warrants and applications were present at the suppression hearing, discussed and passed around; but the State failed to have them introduced or admitted into evidence. The Court of Special Appeals felt that because the warrants were forwarded by Court order to the Circuit Court for Frederick County "for the purpose of their introduction into the records" and the fact that they were physically present at the hearing and that the trial judge "admonished the State not to have witnesses read from the warrant because 'the warrant speaks for itself' ", their non-introduction and lack of admission into evidence was overcome. (A. 28-33)

The introduction and admission into evidence of warrants is a formality that cannot be dispensed with. To hold otherwise would dispense with the necessity to introduce *any* document into evidence where its existence and contents are intended to be proved or that in the alternative a proper foundation be established for the use of secondary evidence. Neither was done here.

B. Because of the descriptive terminology of the things to be seized used in the warrants, they became prohibited "general" warrants not "particularly describing the . . . things to be seized".

The terminology of the warrants in terms of describing the things to be seized is set out in full at page A. 38 of the Opinion of the Court of Special Appeals in the case sought to be reviewed. The Court felt that the warrants were "models of particularity." This is true, *up to a point.* When the language of the warrants left that point of demarcation of particularity, they became general warrants.

Initially, and throughout the lengthy descriptive phrase of the particular things to be seized, the warrant lists, in minute detail, every conceivable piece of writing and tangible evidence possible "showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses" "pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T . . ." The list of papers and records sought in general terms could not possibly be more complete!

But then the prosecutor struck the fatal blow! He showed the true intent of the warrant and its description of things to be seized when he added the following phrase, which negated all of the previously set out general particularity:

> "together with other fruits, instrumentalities and evidence of crime at this time unknown."

The addition of this phrase had the same effect as amending a bill in the Legislature which prohibits sex discrimination by adding a phrase that it "does not apply to women".

The phrase completely reverses and negates the meaning of the language and thereby authorized a prohibited "general rummage through all the materials".

This was not a "minor imprecision in draftsmanship", but a carefully conceived plan to search and seize hordes of material not pertaining in any way to Lot 13, Block T, which plan was in fact carried to fruition and upheld by the Court of Special Appeals.

The Court's Opinion holds that: "We read the questioned phrase as referring to 'other fruits, instrumentalities and evidence' of the crime of false pretenses with respect to Lot 13T." (A. 38) This holding is simply not reasonable. The addition of the phrase extended the warrant to include *any* evidence of *any* crime (not particular evidence of a particular crime) and therefore made the warrants "general". If the phrase referred to Lot 13T, why didn't it say so? Why was it added when the particularity as to 13T was so complete? Why did it allow seizure of evidence "of *crime at this time unknown*"?

The subject officers, approximately eight in number armed with the illegal general authority of the subject warrants, spent about six hours apiece in a general rummage through both premises and went away with boxes full of papers. No large articles, just papers. As a matter of fact, they did not even know what papers they had, for the most part, until they have a chance to go through all the material at a later date. (A. 148-151, 151-153, 153-154).

Additionally it must be said that even the "model particularity" of the warrants was "general" in terms of the unanimous holding in *Vonder Ahe v. Howland, supra.*

Compare the descriptive terms of the warrant in *Vonder Ahe* with those of the instant case and you cannot help but notice the similarity. In *Vonder Ahe*, the warrant was struck down as being "general" and thereby lacking probable cause for its issuance when the Court cited *Berger v. New York*, 388 U.S. 41 (1967):

> The proceeding by search warrant is a drastic one *Sgro v. United States*, 287 U.S. 206 (1932) and must be carefully circumscribed so as to prevent unauthorized invasions of 'the sanctity of a man's home and privacies of life.'" *Boyd v. United States, supra.*

and from *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) when it said:

> The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is tne 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. (citation ommitted). The warrant accomplishes the second objective by requiring a "particular description" of the things to be seized.

and concluded:

> . . . it is difficult to believe that the draftsmen of the 4th Amendment did not insert "unreasonable" to avoid just such an *in terrorem* state as the Agents created and wreaked here.

Also, Article 26, *Declaration of Rights to the Constitution of Maryland* prohibits such "general warrants".

C. Because of the nature of the crime of false pretenses, it was impossible for the judge who issued the warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises.

The search warrants were issued on October 30, 1972, based on contemporaneous affidavits. The very nature of the crime of false pretenses, which was allegedly established in the affidavits as having been committed in July, 1972, is that there was "a false representation of a past or existing fact". *Polisher v. State*, 11 Md. App. 555 (1971). Therefore the issuing judge could hardly have found that a crime was currently "being committed" over three months later, which he did. The Court of Special Appeals, relying on Art. 27, Sec. 551, *Annotated Code of Maryland*, wherein it is stated that a search warrant may be issued upon a finding that probable cause exists that "any property subject to seizure under the criminal laws of this state is situated" on the premises, made the warrant acceptable. The Court then goes on to read the *Fourth Amendment* as part of the "Criminal laws of this State". (A. 37) Even if so, this finding completely ignores the fact that the affidavit in support of the warrant alleged, and the issuing judge found by incorporating the affidavit into the warrant, "that there is probable cause to believe that the laws relating to false pretenses . . . are being violated upon the . . . premises." This was an impossibility.

Also, it is incumbent upon the issuing Judge to have "fresh facts" in order to form a reasonable belief that probable cause exists that the goods or instrumentalities

are still present on the premises upon which they were allegedly observed. In order to reach a reasonable conclusion of probability, the time of the observation and relative "staleness" of the same and the information must be a major consideration. In the instant case, especially at the 3700 Decatur address the information and only pretense of an observation was approximately *three and one-half months old.* These certainly were not fresh enough facts to lead to a reasonable conclusion that the articles were still there. Probable cause was therefore lacking in this respect.

Petitioner produced evidence at the hearing on the motion to suppress and persistently raised the issue that the information contained in the affidavit as to the existence of the alleged liens at the time of the affidavit was false and erroneous. (A. 167-168) Petitioner also continuously contended that, assuming arguendo that the State's proposition that false pretenses was a continuing type crime in this instance, the continuation of the crime had ended on September 13, 1972, when the liens had been paid. This was true even by the State's version where the affidavit stated that one of the two alleged liens was paid and released at the time of the affidavit and the testimony of the affiant (A. 144-147) showed that the other alleged lienor received payment about that same time to be applied to extinguish the alleged lien and that there was some "litigation" . . . "which I didn't get involved in." In other words, it was known, or should have been strongly suspected by the State that, over forty-five days before the affidavit was made, the liens complained of had been extinguished. This rendered the affidavit out of date and "stale" so that it could not produce probable cause.

In addition, the alleged affidavits of police detectives Moyer and Lawrence required these detectives, the only affiants, to draw *legal conclusions* upon which the premise of probable cause was based. This they were not competent or authorized to do. Said legal conclusions, the most important of which was concluding that the Madison note was not paid, are not enough and were in fact erroneous as was later shown in *Clark-King Constr. Co. and Andresen v. Salter,* 269 Md. 494 (1973).

D. The Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by search and seizure violated the principals and purposes annunciated by this Court in *Warden v. Hayden,* 387 U.S. 294 (1967).

The Court of Special Appeals, in the case sought to be reviewed, first, as above stated, held that the subject warrants particularly described the things to be seized as "referring to 'other . . . evidence' of the crime of false pretenses with respect to Lot 13T". (A. 34-5) Then the Court goes on to hold:

> Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake and lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of their *mens rea,* we hold that they too were seizable evidence under the warrants. (A. 47).

What this holding does is to ignore the standard set forth in *Warden v. Hayden, supra,* that:

> Thus in the case of 'mere evidence', probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *In so doing, consideration of police purposes will be required.* (Emphasis supplied)

In the instant case, the papers "not relating to Lot 13T" which were seized, were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses. Instead the prosecutor, after examining the documents for over two weeks, obtained the misappropriation indictments based upon them.

In so doing, and consolidating the false pretense counts with the misappropriation counts for trial, he made the documents relevant in violation of the principles stated in *Huber v. State,* 2 Md. App. 245 (1967). Had it not been for the additional indictments and the consolidation, the additional papers could never have been admitted because they were irrelevant to the false pretense charges. This is clear, because the lower court, despite repeated attempts by the prosecutor throughout the entire trial to introduce other seized evidence of other acts by the petitioner in his attempt to establish *mens rea,* refused its admission. The court properly refused because as the court ruled, the evidence as to the prior acts was clearly inadmissible under the principles of *McEwan v. State,* 194 Md. 494 (1950), due to the fact that the State *never* established a *prima facie* case of guilt in the estimation of the trial judge.

Also, the majority of the papers introduced in the instant case were anywhere from 10 months to 6 years old (A. 155, 156-159, 161, etc.) and so out of date that they could not be connected to an incident 3-1/2 months before. The Court, therefore, was in error in not suppressing them.

Therefore, an examination of the prosecutor's motives, as dictated by this Court in *Warden v. Hayden* reveals that the evidence seized as to the misappropriation counts would also have been inadmissible had it not been for the additional indictments. It should also be noted that these papers were among thousands of others seized. This Court's consideration of the prosecutor's motives should result in a determination of lack of probable cause for the seizure of the papers.

E. The two-prong test of credibility – reliability and trustworthiness of the non-swearing informants was not satisfied.

There were no allegations of direct observation or personal knowledge as to the things sought in the alleged affidavits in support of the search warrants as to whether or not they were present on the premises. Therefore the issuing Judge was forced to rely entirely on information received second, third or fourth hand as hearsay in his determination of probable cause in the warrants. Therefore it was necessary to present reasons why the information received was reliable in order for the magistrate to determine the truthfulness of the information. This is necessary in order to satisfy the two-prong test of credibility-reliability and trustworthiness as enunciated in *Aguilar v. Texas,* 378 U.S. 108 (1964).

The information received in the instant case was not received from "disinterested witnesses", "disinterested civilian sources" or "victims of crime" as opined by the Court of Special Appeals. (A. 43-4) If Young was to be considered as such, it must be noted that the information supplied by him supported no factual basis for the commission of a crime. His information, if in fact he felt something was wrong, was at least fifth or sixth hand. The only possible information that could have led to a belief that a crime had been committed originated with Hecht and by a stretch of the imagination from State National Bank. Hecht (and for that matter Covert of State National) were not disinterested witnesses or victims, they were actually deeply embroiled in a civil controversy with appellant of which the affiants had actual knowledge (A. 144-147). Hecht had admitted to the officers that he had received payments designated for the particular lot subject to the alleged affidavit but was *going to apply them to another debt.* The officers knew that this information should have been presented to the Magistrate in order for him to determine if there was probable cause that a crime had been committed. The officers also knew that there had been a dispute with State National Bank, as well, as to application of payments which had been fully settled by a general release of several lots over forty-five days prior to the affidavit as was borne out by the Covert testimony at the trial. (R. 784-808) The fact that Hecht's information was false and erroneous was borne out as well, not at the trial, but by the decision of the Court of Appeals of Maryland in the *Clark-King* case, *supra.* These facts were not set out as was necessary for the Magistrate to determine the credibility and reliability of the informants on the trustworthiness of their information as is required.

There must be facts set out in the affidavit to show the credibility of the informant and the reliability of his information. This necessary rule was not followed in the instant case. There were no such statements of facts set forth whatsoever.

Also, the information, particularly that given by Norman Hecht, that the Madison note was not paid, was later proven to be false and erroneous in the *Clark-King Constr. v. Salter* case, *supra* in which the Court found that the identical *Madison note had been fully paid.* This evidences the unreliability of the information furnished by Hecht and others. This is also true of State National Bank as was later shown at the trial. (R. 784-808)

For these reasons, the warrant should have failed.

CONCLUSION

For the foregoing reasons, especially as to the Fifth Amendment contentions, the counts upon which petitioner remains convicted should be reversed and the cause remanded for proper disposition by the Courts of Maryland.

Respectfully submitted,

PETER C. ANDRESEN
3514 Plyers Mill Road
Kensington, Md. 20795

Petitioner